Selvamary d/o P Sathianathan v G Rethinasamy

HIGH COURT (PENANG) – ORIGINATING SUMMONS NO 31-868-1988
EDGAR JOSEPH JR J
28 APRIL 1989

Civil Procedure – Parties – Appeal – Complaint against advocate and solicitor – Bar Council determining that no formal inquiry necessary – Appeal against determination to High Court – Whether Malaysian Bar should have been made a respondent – Whether Bar Council should have been made a respondent – Legal Profession Act 1976, ss 47, 98 & 103

Legal Profession – Complaint against advocate and solicitor – Bar Council determining that no formal inquiry necessary – Appeal against determination to High Court – Whether Malaysian Bar should have been made a respondent – Whether Bar Council should have been made a respondent – Legal Profession Act 1976, ss 47, 98 & 103

The appellant brought an appeal to the High Court against the decision of the Bar Council under s 98 of the Legal Profession Act 1976 that a formal inquiry into her complaint against the advocate concerned by a disciplinary committee to be appointed by the Chief Justice was not necessary. Counsel for the advocate took a preliminary objection, to wit, that the Bar Council (or more appropriately the Malaysian Bar) although a necessary party to the appeal had not been cited as such, and since the period for appeal had long since expired the appeal was incompetent and ought, on this ground alone, to be dismissed in limine. It was contended for the appellant that all that the appellant was required to do under s 103 of the Act, in order to bring the appeal, was to serve a copy of each of the documents referred to therein, on the Bar Council, and that as there had been compliance with this requirement, the appeal could proceed.

Held, dismissing the appeal:

(1) The Malaysian Bar should have been made a respondent to the present appeal as it would be directly affected by the order made by the court. The Bar Council is by definition the central council of the Malaysian Bar, established under s 47 of the Act and is a purely executive body charged with the responsibility of the proper management of the affairs of the Malaysian Bar and for the proper performance of its functions and not therefore a legal entity. Accordingly, it was not the Bar Council but the Malaysian Bar which must be made a respondent to the present appeal.

(2) There is no provision in the Act empowering the court to enlarge time for the purpose of enabling a complainant to bring an appeal. Accordingly, as the time limited for appealing had long since expired, it would be an act of supreme futility to give the appellant leave to amend the originating summons by adding the Malaysian Bar as a party.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-196-89.]

Cases referred to

1 *Employees Provident Fund Board* v *Employees Provident Fund Board Staff Union* [1976] 2 MLJ 225 (refd)
2 *P Suppiah* v *The Law Society of Singapore* [1986] 1 MLJ 459 (refd)
3 *Lee Lee Cheng* v *Seow Peng Kwang* [1960] MLJ 1 (refd)
4 *Christopher* v *Croll* (1885) 16 QBD 66 (refd)
5 *Gurbachan Singh* v *Seagrott and Campbell (No 2)* [1962] MLJ 370 (refd)

Legislation referred to

Courts of Judicature Act 1964
Legal Profession Act 1976 ss 47, 98, 103 .
Rules of the High Court 1980 O 53 r 2(3)
Legal Profession Act (Cap 161, 1985 Ed) [Sing] s 93
Rules of the Supreme Court 1965 [UK] O 53 r 5(3)

M Thayalan for the plaintiff/appellant.
RJ Maneksha for the defendant/respondent.
PR Maneksha for the Bar Council.

Cur Adv Vult

Edgar Joseph Jr J: The essential ingredients in the constitution of civil proceedings are the parties to the proceedings and the claims made in it. Although these are two separate subjects they are closely related, as appears from the pertinent question that may be posed in any proceedings: 'Who may make what claim against whom?' Turning from the general to the particular, there is now before me an appeal by the complainant from the decision of the Bar Council under s 98 of the Legal Profession Act 1976, ('the Act') that a formal inquiry into her complaint against the advocate concerned by a disciplinary committee to be appointed by the Chief Justice is not necessary.

The appeal is brought under s 103 of the Act which provides:

> (1) A person who has made a complaint under section 95(1) and who is dissatisfied with the findings of the State Bar Committee or of the Inquiry Committee or with the determination of the Bar Council on the complaint may, within fourteen days of receiving the notification under section 98(c), appeal to a Judge of the High Court against such finding or determination or both.
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> (2) The appeal shall be by way of originating summons and shall be accompanied by an affidavit of the facts constituting the basis of the complaint and by a copy of the complaint originally made to the Bar Council, together with a copy of the notification mentioned in section 98(c).
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> (3) A copy of each of the documents referred to in subsection (2) shall be served on the Bar Council.

At the outset, counsel for the advocate concerned took a preliminary objection, to wit, that the Bar Council (or more appropriately the Malaysian Bar) whose decision was in question, although a necessary party to the appeal had not been cited as such, and since the period for appealing had long since expired the appeal was incompetent and ought, on this ground alone, to be dismissed in limine. In this, he was supported by counsel for the Bar Council.

On the other hand, counsel for the complainant answered the objection by pointing out that all that the

complainant was required to do under s 103 of the Act, in order to bring the appeal, was to serve a copy of each of the documents referred to therein, on the Bar Council, and that as there had been compliance with this requirement, the appeal could proceed. He sought to derive analogical support from the procedure prescribed by O 53 r 2(3) of the Rules of the High Court 1980, relating to the mode of applying for orders of mandamus, prohibition and certiorari, at the full hearing, which reads as follows:

> The notice or summons must be served on all persons directly affected, and where it relates to any proceedings in or before a Court, and the object is either to compel the Court or an officer thereof to do any act in relation to the proceedings or to quash them or any other order made therein, the notice or summons must be served on the Clerk or Registrar of the Court, the other parties to the proceedings and, where any objection to the conduct of the Judge is to be made, on the Judge.

In support, he cited the case of *Employees Provident Fund Board* v *Employees Provident Fund Staff Union*,[1] where, in an application for certiorari to quash a decision of the Industrial Court, a preliminary objection had been taken, that the Attorney General and the Industrial Court had to be served. Chang Min Tat J before whom the matter came up said this:

> In so far as the Industrial Court is concerned, the practice is covered by the practice in England as contained in O 59 r 5(2) of the 1957 Rules of the Supreme Court. Rule 5 provides that when leave has been granted to apply for an order, inter alia, of certiorari, the application should be made by notice of motion. Sub-rule (2) provides that the notice of summons shall be served on 'all persons directly affected'. Mr Saw thought that the Industrial Court has no corporate personality and could not sue or be sued (see *Industrial Arbitration Tribunal* v *Cargo Handling Corp Ltd* (1967) 2 MLJ 98 FC). It could consequently not be served. Mr Rekhraj, whom I heard as amicus curiae since he was concerned with another similar application in which Mr Puthucheary also proposed to take the same objections, suggested that under s 21 sub-s (2) of the Industrial Relations Act no member of the court should be compelled by any court of law to appear as a witness or party and he contended, therefore, that the Industrial Court could not be served. Section 21(2) of the Industrial Relations Act however refers to the immunity given to members of the Industrial Court but, with respect, I am of the view that this is not a question of service of the court in a matter in which the immunity given to members of the court is being violated. Service does not mean compulsion to appear before any court of law as a witness or party. I also am of the opinion that the lack of personality in the Industrial Court is not of any materiality in the matter of service.
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> The 1962 *Annual Practice* at p 1731 on O 59 r 5(2) under 'persons directly affected' has this to say:
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> > 'In addition to the court whose proceedings are in question, the notice of motion or summons should also bear the name, as respondent, of the other party to the proceedings before it.'
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> I think it is clear that giving the words their ordinary grammatical meaning the words 'persons directly affected' must mean and include the Industrial Court in this case. *All that is required under this rule is to serve the notice or the summons applying for certiorari on the Industrial Court. What the Industrial Court proposes to do after that in respect of the notice is a matter for its own decision.* (Emphasis supplied)

I note, that our O 53 r 2(3) (which is in pari materia with O 53 r 5(3) of the present English Rules of the Supreme Court 1965, which in turn is in pari materia with its predecessor, being O 59 r 5(2), to which Chang Min Tat J refers), provides:

> The notice or summons must be served on all persons directly affected, and where it relates to any proceedings in or before a Court, and the object is either to compel the Court or an officer thereof to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons must be served on the Clerk or Registrar of the Court, the other parties to the proceedings and, where any objection to the conduct of the Judge, is to be made, on the Judge.

In his book *Judicial Review: Law and Procedure*, RJF Gordon at p 92 paras 9-04 says:

> Parties
>
> 9-04 *All persons who are 'directly affected' are required to be made respondents to the proceedngs.* If, on the full hearing the court takes the view that a person ought to have been served as respondent it may adjourn the hearing, pursuant to O 53 r 5(7), on such terms as it thinks fit for service to be effected. (Emphasis supplied)

And, in the very next paragraph, under the heading 'Other interested parties', he says this:

> Apart from the applicant and respondent(s) there is provision in the rules for other persons to appear at the full hearing. Order 53 r 9(1) states that '... any person who desires to be heard in opposition to the motion or summons, and appears to the court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the motion or the summons.'
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> Presumably this is a broader category than those persons required to be served, and enables the court to admit a variety of interested parties to make representations at the hearing even though they have no strict locus. This is not entirely clear, however, and it may be that this rule is merely intended to be an alternative to adjourning the application for proper service under r 5(7).

I would respectfully adopt the views of Mr Gordon and hold that when our O 53 r 2(3) provides that the notice of summons must be served on all persons directly affected it means that such persons are required to be made respondents to the proceedings. I hasten to add that I do not question the proposition in the *EPF Board* case[1] that the Industrial Court need not be made a party to certiorari proceedings seeking to impugn its decisions but if Chang Min Tat J intended by the passages cited to lay down the general proposition that persons directly affected within the meaning of the rule need only be served and so need not be made respondents, then I must respectfully part company with him. It follows, therefore, that the argument by analogy based on O 53 r 2(3)

advanced by counsel for the complainant does not commend itself to me.

Now, if the complainant succeeds in this appeal, then the court would have to order that the Bar Council – the executive arm of the Malaysian Bar – do refer the complaint to the Chief Justice for a formal inquiry under the Act. In such a situation, the Malaysian Bar would be directly affected by the order made by this court and unless it is made a party it could, perhaps, thumb its nose at such order. I would, at this point, interpolate to mention by way of explanation, that whilst the Bar Council is by definition the central council of the Malaysian Bar, established under s 47 of the Act, it is a purely executive body charged with the responsibility of the proper management of the affairs of the Malaysian Bar and for the proper performance of its functions and not therefore a legal entity. Accordingly, it is *not* the Bar Council but the Malaysian Bar which must be made a respondent to the present appeal.

I note, in passing, and without placing undue stress on the point, that s 93 of the Singapore Legal Profession Act (Cap 161, 1985 Ed) is generally in pari materia with s 103 of the Act and that the practice there would appear to be to make the Law Society of Singapore (equivalent to the Malaysian Bar here) a party to the appeal to the High Court brought by a dissatisfied complainant. (See for example the case of *P Suppiah* v *The Law Society of Singapore*[2]). In my view, therefore, having regard to the provisions of s 103 of the Act, the Bar Council must be served with each of the documents referred to and the Malaysian Bar made a respondent. As in this case the latter requirement was not satisfied, the next question which arises is whether I am empowered to give the complainant leave to amend the originating summons by adding the Malaysian Bar as a respondent. I note that under s 103(1) of the Act, the complainant has 14 days from date of receipt of the Bar Council's decision within which to appeal if he is satisfied with the same. But, there is no provision in the Act empowering the court to enlarge time for this purpose. I have considered the provisions of para 8 of the Schedule to the Courts of Judicature Act 1964, which reads:

> Jurisdiction to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until after the expiration of the time prescribed.

But it is well established that this provision is merely declaratory of the jurisdiction of the High Court to enlarge time prescribed by any written law for doing any act or taking any proceeding always providing there is express provision in the particular written law itself which enables such time to be enlarged. (See *Lee Lee Cheng* v *Seow Peng Kwang*[3] per Rigby J at p 4). Accordingly, as the time limited for appealing has long since expired, it would be an act of supreme futility to give the complainant leave to amend the originating summons by adding the Malaysian Bar as a party. An appeal is, after all, only brought when the originating process is served upon the respondent. (See *Christopher* v *Croll*[4] followed in *Gurbachan Singh* v *Seagrott and Campbell*[5]).

In the result, the preliminary objection succeeds and this appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitors: *Meena, Thayalan & Partners*; *Rethina & Co.*

Reported by *PS Ranjan*

Syarikat Nam Lee Amang Factory Sdn Bhd v President, Mesyuarat Lembaga Pengurus, Majlis Perbandaraan Ipoh

HIGH COURT (IPOH) – ORIGINATING MOTION NO 2 OF 1985
ABDUL MALEK J
13 APRIL 1989

Local Government – Annual value of property – Valuation – Appeal – Whether valuation correct – Notice of assessment – Mistake in notice as regards lot number of property – Whether a ground for setting aside rate imposed – Local Government Act 1976, ss 141, 144, 146, 158 & 163

Revenue Law – Property – Annual value of property – Valuation – Appeal – Whether valuation correct – Notice of assessment – Mistake in notice as regards lot number of property – Whether a ground for setting aside rate imposed – Local Government Act 1976, ss 141, 144, 146, 158 & 163

The applicant was dissatisfied with the assessment by the municipal authority of the rateable value of the applicant's property under the Local Government Act 1976 and appealed to the High Court against the respondent's decision confirming the assessment. The property was originally part of a lot numbered 36058 which was outside the municipal limits prior to 1983. Some time later, lot 36058 was divided by the authorities into three lots, two of which numbered 72305 and 57785 respectively and comprising about seven acres in area or 58.12% of the original lot, were alienated to the applicant. Eventually, the applicant's property came within the municipal limits with effect from 1 January 1980.

The first notice of assessment was dated 18 November 1982 and it was argued for the applicant that it applied to the whole of lot 36058. Following an appeal, the respondent reduced the value stated in the notice from $35,100 to $26,400 with effect from 1 January 1983. On appeal to the High Court, it was contended for the applicant:

(a) that the said lots and buildings had been valued beyond their rateable value;
(b) that the authorities had erred in their assessment by assessing the property and buildings at a gross annual value of $26,400 without the grounds given by the respondent's valuation officer;
(c) that the basis on which the authorities valued the property was wrong;